

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

MAY 15 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHRISTOPHER JUDE KAKAR,

Petitioner,

v.

HON. THERESA H. RATLIFF, Judge
Pro Tempore of the Superior Court of the
State of Arizona, in and for the County of
Pinal,

Respondent,

and

VIRGINIA HELENE GRAMMER,

Real Party in Interest.

2 CA-SA 2009-0027

DEPARTMENT B

DECISION ORDER

SPECIAL ACTION PROCEEDING

Pinal County Cause No. SE200600239

JURISDICTION ACCEPTED; RELIEF GRANTED

David Alan Dick and Associates
By David Alan Dick

Attorneys for Petitioner

¶1 In this special action, petitioner Christopher Kakar challenges the respondent judge's March 10, 2009 order finding Kakar in contempt for failing to pay child support and

requiring him to begin serving a previously suspended, 180-day jail term. Because a contempt order is not appealable, review can only be obtained by special action. *See Munari v. Hotham*, 217 Ariz. 599, ¶ 7, 177 P.3d 860, 862 (App. 2008). Therefore, we accept jurisdiction of this special action. *See id.*; Ariz. R. P. Spec. Actions 1(a).

¶2 A substantial portion of the procedural background is set forth in this court’s memorandum decision in Kakar’s appeal from an order entered in the underlying child support proceeding. *See State ex rel. Gramm[e]r v. Kakar*, No. 2 CA-CV 2008-0167 (memorandum decision filed Apr. 10, 2009). We affirmed the support order but refused to address the September 5, 2008 contempt order on the ground that, as we noted above, that order was not appealable; the paucity of the record regarding the contempt order made it difficult to review; and, review hearings apparently had been held while the appeal was pending. *Id.* ¶¶ 9-10.

¶3 At the March 10 contempt hearing, Kakar submitted a log listing the places he had sought employment and apparently testified about his efforts to find employment, his lack of success in finding a job, and his reliance on food stamps and his mother for support. The respondent judge implicitly reaffirmed her previous finding of contempt and ordered Kakar to begin serving the 180-day jail term, setting “a release amount in the sum of \$3,000.00,” and continuing the contempt proceeding for “Review of Purge Conditions” on April 8, 2009. In this special action, Kakar asserts the finding of contempt is not supported by the evidence, which did not show his failure to try to find employment but rather his lack of success.

¶4 We have not been provided a transcript of the March 10 hearing. We generally assume an absent transcript supports a trial court’s factual findings. *See State ex rel. Ariz. Dep’t of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 20, 66 P.3d 70, 73 (App. 2003); *Retzke v. Larson*, 166 Ariz. 446, 449, 803 P.2d 439, 442 (App. 1990). *But see Weiss v. Superior Court*, 106 Ariz. 577, 579-80, 480 P.2d 3, 5-6 (1971) (in case of direct criminal contempt, deficiency of order failing to specifically state factual findings upon which contempt finding is based can be cured if transcript or other portion of record available and supplies missing facts; otherwise, lack of specific findings “fatally defective”). Moreover, we defer to the respondent judge with respect to credibility assessments. *See In re Marriage of Berger*, 140 Ariz. 156, 162, 680 P.2d 1217, 1223 (1983). Additionally, we will not disturb a contempt order absent an abuse of discretion. *See Munari*, 217 Ariz. at 605, 177 P.3d at 866. Similarly, we will only grant special action relief if the petitioner establishes one of the grounds for relief set forth in Rule 3, Ariz. R. P. Spec. Actions, among which is an abuse of discretion. An abuse of discretion, however, includes an error of law. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006). And we review questions of law de novo. *See State v. Romero*, 216 Ariz. 52, ¶ 3, 162 P.3d 1272, 1273 (App. 2007).

¶5 The abuse of discretion here relates to the lack of specificity in the respondent judge’s order and the potentially contradictory nature of her ruling, which impede our ability to meaningfully review it. The order suggests the respondent judge questioned whether Kakar had been secreting assets that he could have used to satisfy his child support obligation. However, it is not at all clear whether that was the basis for the respondent’s

finding of contempt and the imposition of the jail term; the respondent simply did not make that finding. The order also suggests the respondent considered the fact that Kakar has family members with financial resources to satisfy Kakar's support obligation and thereby purge Kakar of his contempt. This suggestion is problematic in two respects. First, it contradicts any notion that Kakar has sufficient independent financial resources to pay the support obligation and is hiding those resources. Second, a person's child support obligation is his or her own, not that of family members or friends, whose financial resources cannot be considered in determining the parent's income for purposes of calculating child support. *See* A.R.S. § 25-320 app. § 5(F) ("Only income of persons having a legal duty of support shall be treated as income under the [child support] guidelines. For example, income of a parent's new spouse is not treated as income of that parent."). It is axiomatic that, because a third person's income cannot be the basis of a support order, family resources cannot be regarded as a viable source from which a contempt-purging payment can be made.

¶6 Moreover, the respondent judge fails to distinguish Kakar's ability to work from his lack of success in finding employment. In the March 10 order, the respondent noted she had advised Kakar he "has the ability to obtain a job," by which we assume she meant Kakar is able to work. The fact that Kakar is able to work, however, does not necessarily lead to the conclusion that he is able to secure employment. To the extent the respondent based her ruling exclusively on Kakar's lack of success in finding employment, she effectively punished him simply for being unable to pay child support. Article II, § 18 of the Arizona Constitution prohibits "imprisonment for debt, except in cases of fraud." Given this

constitutional protection against anachronistic and inequitable debtors' prisons, a person can be imprisoned for failing to pay child support only if the person fails to satisfy that obligation without good cause. *See* § 25-320 app. § 5(A) (setting forth sources of income relevant to determination of parent's ability to pay support); A.R.S. § 25-511(B) (establishing inability to pay as defense to charge of failure to provide support); *cf. Stone v. Stidham*, 96 Ariz. 235, 237, 393 P.2d 923, 924 (1964) (husband who fails without good cause to pay former wife as ordered in divorce decree may be incarcerated for contempt).

¶7 A parent who is unable to pay support cannot be held in contempt of court for failing to do so. As in the analogous context of probation revocation, a person cannot be sanctioned for failing to pay a probation-related obligation without a proper inquiry into the person's ability to pay. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983); *State v. Robinson*, 142 Ariz. 296, 297-98, 689 P.2d 555, 556-57 (App. 1984). In *Bearden*, the Supreme Court held that a defendant's probation cannot be revoked unless the court finds the person "willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay." 461 U.S. at 672.

¶8 Because of the unclear and potentially inconsistent findings the respondent judge made here, we cannot determine whether she found Kakar in contempt and imposed the jail term on the ground that Kakar had sufficient independent resources to pay child support as ordered and nevertheless refused to pay or because Kakar had not made a good-faith effort to find employment. The contempt sanction chosen by the court adds little clarity to these findings. Rather than crafting an order that would have given Kakar the opportunity

to seek employment and thereby purge himself of the contempt—for example an order imposing weekends in jail until he secured employment during the week—the respondent ordered him to serve the 180-day jail term as “flat time,” a term that could be shortened only if he paid \$3,000.00 toward his child support arrears. That sanction suggests that the court either believed Kakar was hiding assets, a finding the court never made, or that Kakar’s family and friends might provide him sufficient assets to secure his release, a basis for the order that would be improper. And if the respondent believed Kakar could have tried harder to secure employment, the 180-day jail term made it impossible for him to purge himself of the contempt. She effectively took from Kakar the “keys of [his] prison,” which essentially punished him for failing to pay a debt. *State v. Cohen*, 15 Ariz. App. 436, 440, 489 P.2d 283, 287 (1971), *quoting In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902).

¶9 For the reasons stated herein, we find the respondent judge abused her discretion. Therefore, we remand this matter to the respondent so that she may enter further findings of fact and reconsider her orders in a manner consistent with this decision.

PETER J. ECKERSTROM, Presiding Judge

Judges Brammer and Vásquez concurring.